BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD J. CHRISTENSON Claimant	)	
VS.	)	
JOEL FRITZEL CONSTRUCTION INC. Respondent	)	Docket No. 267,181
AND	)	
ALLIED MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent requests review of a preliminary Order entered by Administrative Law Judge Brad E. Avery on September 17, 2001.

ISSUES

The Administrative Law Judge determined claimant sustained accidental injury arising out of and in the course of employment and claimant provided timely written claim.

The respondent raises the issues of whether the claimant's accidental injury arose out of and in the course of employment on October 13, 2000, and whether the claimant provided timely written claim.

Conversely, the claimant contends the Administrative Law Judge's Order should be affirmed.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant, Richard J. Christenson, was employed as a commercial project manager for the respondent. The project manager is a working supervisor and performed the same job duties as the workers he supervised. The claimant sustained an injury at

work on Friday, October 13, 2000, while operating a skid loader to remove a large stump. The claimant described the procedure as ramming into the stump to dislodge it. At the conclusion of work that day claimant testified his back was stiff and sore.

Claimant testified that over the weekend his back pain worsened with pain down into the back of his left leg. Claimant also noted that after he got out of the hot tub on Sunday he experienced severe pain but after laying down for awhile the pain subsided. On Monday, the claimant worked in the office and noted severe back pain when he would get up from the computer work at his desk to retrieve documents from the printer.

Claimant advised Dennis Gisel, the vice-president for respondent, he had sustained a work-related injury operating the skid loader on October 13, 2000. Mr. Gisel agreed he had been advised claimant was experiencing low back pain on Monday, October 16, 2000. In a second conversation that occurred within a week, claimant advised Mr. Gisel that he hurt his low back operating the skid loader on October 13, 2000.

On Tuesday, October 17, 2000, the claimant was experiencing severe pain and sought treatment with Dr. William Miller. The office records of Dr. Miller contain a diagnosis of lumbar strain from running the bobcat on October 13, 2000. Dr. Miller took x-rays and advised claimant there was nothing he could do.

Claimant then went to Dr. Stephen Nolker's office and was referred to the emergency room. Claimant noted the pain was severe and he was provided pain medication and an MRI was taken. Thereafter, claimant was sent home and an appointment with Dr. Richard Wendt was made.

The claimant saw Dr. Wendt on October 23, 2000, and the doctor's office notes indicate claimant had no true history of any particular injury. Claimant saw Dr. Wendt again on November 24, 2000, and related a history of an onset of pain following removal of the tree stump with the skid loader. At the November visit, Dr. Wendt noted claimant was doing well and should return as needed.

The claimant's employment with respondent was terminated on November 7, 2000. On November 15, 2000, the claimant completed an employer's report of accident and returned it to respondent as well as faxing it to the respondent's insurance carrier. Claimant stated he completed the form so he would receive workers compensation benefits.

Respondent's primary contention is the contemporaneous medical records do not support the claimant's assertion that he sustained a work-related injury on October 13, 2000, as a result of operating the bobcat (skid loader) that day. On Tuesday, October 17, 2000, when claimant began seeking treatment the office records from the physician's office and the emergency room indicate no specific injury and an onset of pain following a nap on Sunday, October 15, 2000. Later when claimant saw Dr. Wendt on October 23, 2000,

the doctor noted no true history of any particular injury. Lastly, the physical therapist's notes did not mention a work-related injury.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2]

Claimant testified that initially he did not think much about the fact that he was stiff and sore following the completion of work on Friday, October 13, 2000. Claimant noted that was frequently the case but such pain and stiffness would normally resolve over the weekend. When it worsened the claimant finally concluded the activity at work removing the large stump was the only possible cause of his back pain.

Dr. Miller's office records indicate the doctor was advised about the tree stump removal activities and although it is admittedly difficult to determine when that notation was made by the doctor it appears it was contemporaneous with the office visit on October 17, 2000. The fact that the other records of visits the same day note an onset of pain over the weekend is not necessarily inconsistent because the claimant had noted the pain worsened over the weekend. Moreover, by the time the claimant saw the other physician and emergency room personnel he testified he was in excruciating pain and does not recall what was said.

The Board concludes the claimant has met his burden of proof that he sustained a work-related injury to his low back on October 13, 2000, while operating a skid loader to remove a large tree stump.

The respondent next contends the claimant failed to file timely written claim. The claimant testified when he advised Mr. Gisel that he sustained a work-related injury he was provided an employer's report of accident. The claimant completed the report and returned it to the respondent and faxed a copy to the respondent's insurance carrier. Claimant testified he completed the form in order to receive workers compensation benefits.

The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it. Craig v. Electrolux Corporation, 212 Kan. 75, 82, 510 P.2d 138 (1973). The same purpose or function has, of course, been ascribed to the requirement for notice found in K.S.A. 44-520. Pike v. Gas

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[1]K.S.A. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[2]K.S.A. 44-508(g). *See also* *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

Service Co., 223 Kan. 408, 573 P.2d 1055 (1978). Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation. In Fitzwater v. Boeing Airplane Co., 181 Kan. 158, 166, 309 P.2d 681 (1957), the Kansas Supreme Court described the test as follows:

> In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?

The accident report form claimant completed on November 15, 2000, contained a description of the accident and injury. Certainly, it satisfied the purpose of allowing respondent the opportunity to investigate. It is uncontradicted that by completion of the form the claimant intended to ask for workers compensation benefits. Claimant testified he completed the form so he would receive workers compensation benefits.

The document completed by claimant was an Employer's Report of Accident form. K.S.A. 44-557 sets forth the circumstances under which an employer is required to file a report of accident. To encourage compliance with this requirement, a report form is provided by the Division of Workers Compensation and, under certain circumstances, the Act affords an employer certain protections for statements it makes in that report.[3] For this reason, the Employer's Report of Accident form is not intended to be and should not be used as a substitute for a claim form. It is also not intended for use as an internal incident report. Giving an employee an Employer's Report of Accident form to fill out as a method of requesting workers compensation benefits is not the intended use of the Division's report form. However, the writings claimant made on the form are not protected or barred from evidence by K.S.A. 44-557(b). But looking beyond the four corners of that exhibit, claimant testified to making a writing as part of making a claim for workers compensation. He further testified this was done within 200 days of his accident. His testimony is uncontroverted. This testimony, standing alone, satisfies claimant's burden even without introducing the actual document.

The Board concludes the document claimant signed on November 15, 2000, should be treated as a written claim and, therefore written claim was timely.

AWARD

[3]K.S.A. 44-557(b).

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated September 17, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2001.

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BOARD MEMBER

c: Chris Miller, Attorney for Claimant
John F. Carpinelli, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director